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No. 719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL COMMUNICATIONS, INC., ET AL.

AND

WATSON COMMUNICATIONS SYSTEMS, INC., ET AL.

Appellants

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AND

PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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February 21, 1959.

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JURISDICTIONAL STATEMENT

The above-captioned appeals are from the Supreme Court of California's decision in a consolidated proceeding which affirmed an order of the California Public Utilities Commission. That order accepted a so-called "tariff" filed by the Pacific Telephone and Telegraph

Company for radio equipment rentals over the protest of numerous persons adversely affected by the Telephone Company's effort to take over this private competitive business. Inasmuch as these appeals present analogous issues, a single Jurisdictional Statement on behalf of all appellants is being filed in accordance with Rule 15(3) of this Court.

OPINIONS BELOW

The majority and minority opinions of the Supreme Court of California (App. A, *infra*, pp. A1, A14) are reported at 50 Cal. 2d 512; 327 P. 2d 513. The opinion of the Public Utilities Commission of the State of California is reported at 55 Cal. P. U. C. 387.

JURISDICTION

On January 29, 1957, the Public Utilities Commission of the State of California approved a "tariff" filed by Pacific Telephone and Telegraph Company. On August 30, 1957, the Supreme Court of California at the instance of these appellants and others issued a writ of review as to the Commission's ruling, but on June 27, 1958, after consideration of briefs and oral argument, affirmed the order of the Commission by a 4-3 decision. On July 23, 1958, the California Supreme Court by a 4-3 decision denied timely filed petitions for rehearing and reconsideration. Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of California on October 17, 1958 by these appellants, and on November 12, 1958 the Chief Justice of the Supreme Court of California pursuant to Rule 13(1) of this Court granted until February 22, 1959 to docket the instant record here.

The jurisdiction of this Court is conferred by Title

28, United States Code, Section 1257(2). Jurisdiction of this Court to review the judgment of the Supreme Court of California by appeal is confirmed by *Cities Service Gas Co.* v. *State Corporation Comm'n*, 355 U.S. 391 (1958); *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 (1955); *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Comm'n of California*, 346 U.S. 346 (1953); and *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1949).

STATUTORY PROVISIONS INVOLVED

Sections 2(b), 3(e), 301 and 313 of the Communications Act, 47 U.S.C. §§ 151 *et seq.*, are excerpted in Appendix B (pp. A23-24, *infra*). The court below also considered several California statutory and constitutional provisions.

QUESTIONS PRESENTED

The Supreme Court of California held that the Public Utilities Commission's approval of a voluntary "tariff" filing permitted the Telephone Company to engage in the private radio equipment business, notwithstanding the 1956 federal antitrust decree which confined AT&T and its subsidiaries (including Pacific Telephone and Telegraph Company) to the performance of common carrier communications services. Furthermore, the California Supreme Court ruled that the Commission's public utility controls were not invalidated by the Communications Act of 1934 which vests plenary control of the radio spectrum in the Federal Communications Commission and declares the paramount federal policy of competition in radio communications and equipment. Finally, the California Supreme Court decided that the Fourteenth Amendment

to the Constitution of the United States was not offended by the Commission's regulation permitting a telephone monopoly to invade the private radio business where numerous independent firms operate on a free and competitive basis.

Accordingly the questions presented are:

(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws;

(2) Whether the Communications Act's paramount federal policy of fostering competition in the development of radio over the public airwaves does not preclude individual states from imposing utility regulation on the private radio business;

(3) Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are not infringed by state utility controls sought by a telephone monopoly to take over markets served by numerous independent competitors.

STATEMENT

On January 24, 1956, the United States District Court for the District of New Jersey entered a decree terminating an antitrust action by the United States against Western Electric Company and American Telephone and Telegraph Company under the Sherman Act. In pertinent part, Section V of that consent decree perpetually enjoined AT&T and its subsidiaries (including Pacific Telephone and Telegraph Company) from engaging "in any business other than the furnishing of common carrier communications services." A proviso in Section V exempted several specified non-common carrier activities from this prohibition, including, for a five-year period ending in January 1961, "leasing and

maintaining facilities for private communications systems, the charges for which are not subject to public regulation." [1]

On March 30, 1956, Pacific Telephone and Telegraph Company, a subsidiary of AT&T, filed with the Public Utilities Commission of the State of California a so-called tariff Schedule No. 108-T of monthly charges for the combined rental and maintenance of mobile radio communications equipment on a package basis as a public utility service to private customers licensed by the Federal Communications Commission. Identical radio equipment had long been marketed, on a sale or lease basis, by a number of suppliers, and was distributed and serviced in California and elsewhere by numerous independent business organizations, such as these appellants. Whether marketed by the Telephone Company or independent competitors, such equipment was operated over radio frequencies granted by the Federal Communications Commission to individual licensees, (e.g., taxi fleets or police organizations) solely for private vehicular intercommunication. 47 Code Fed. Regs. § 16.1 *et seq.* (1958). Save for emergencies, the equipment thus permitted communication by radio only among the moving vehicles employed in the licensee's own private business, and not with the Telephone Company's public telephone network.

The Public Utilities Commission's approval, without hearing, of this tariff was protested by several adversely affected competing concerns as well as the City of Los Angeles. Apart from asserted deficiencies under California law, the tariff was challenged as a ruse by the Telephone Company for converting a private competi-

[1] See note 8, *infra*, for text of the decree provision.

tive business into a "public utility service" in order to circumvent the restrictions of the antitrust decree.[2]

After a subsequently instituted administrative proceeding, the Public Utilities Commission rejected these contentions on January 29, 1957. 55 Cal. P.U.C. 387. The Public Utilities Commission declined to "take judicial notice of good or bad intentions" by the Telephone Company in the absence of proof, and declared:

> "In any event, it is for the federal courts, and not for this Commission, to implement their decisions; and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position. If the federal court had wished to bar such activities by the applicant even though subjected to regulation, it would have made such provision and the question would not be before this Commission. So far as the effect of the Consent Decree is concerned, it is not actually pertinent to the issues in this case." 55 Cal. P.U.C. 387, 399 (1957).

It "appearing" to the Supreme Court of California that the Public Utilities Commission had "exceeded [its] authority and jurisdiction," that court on August 30, 1957 granted petitions by these appellants and the City of Los Angeles to review the Commission's ruling.[3]

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[2] These contentions and the bar of the federal Communications Act were also urged by appellants and others in briefs filed with the Commission, and in petitions for rehearing of the adverse Commission decision.

[3] The petitions reiterated the illegality of the Commission's ruling by reference to the antitrust decree and the paramount provisions of

After a consolidated review proceeding in which the Telephone Company participated as real party in interest, a 4-3 decision of the California Supreme Court on June 27, 1958 affirmed the Commission in all pertinent respects.[4] 50 Cal. 2d 512; 327 P. 2d 513 (1958). (App. A, pp. A1-13, *infra*).

Besides disposing of the issues of state law adversely to appellants, the majority opinion perceived no infringement of the Fourteenth Amendment. (Pp. A9-10, *infra*). The majority also resolved against appellants the "question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to." (P. A11, *infra*).

As to these federal issues, the court held that the state commission's jurisdiction was not displaced by the Communications Act of 1934. (P. A11, *infra*). The court also considered and rejected the position of the United

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the federal Communications Act, and also challenged the Commission's action as contrary to the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

The Public Utilities Commission's Answer to Petitions for Review acknowledged that "While it may well be that the Pacific Company decided to dedicate itself to provide the installing, leasing, and maintaining of private mobile communication systems as a public utility service so that there could be no doubt of the California Commission's jurisdiction over the rates for such service, and so that in turn there could be no doubt of satisfying the condition imposed by the consent decree, it is obvious that there is nothing unlawful in such a decision." P. 6.

[4] The contentions of the several petitions for review, including appellants, and the *amici curiae* were thus summarized below: "The petitioners urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party." (P. A2, *infra*).

States Department of Justice, expressed before the Federal Communications Commission, that the antitrust decree was an absolute bar to efforts by AT&T or its subsidiaries to engage in the private communications equipment business by tariff filings before regulatory agencies.[5] (P. A12-13, *infra*). Instead, the court quoted a now rescinded dictum by the Federal Communications Commission that "it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree to prohibit the service, regulated or unregulated."[6] (P. A13, *infra*). The court

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[5] On February 21, 1957, AT&T also filed with the Federal Communications Commission a so-called Tariff No. 235 purporting to submit charges for private mobile radio equipment rentals and servicing to FCC regulation. This tariff was subsequently "suspended" by the Commission. *American Telephone & Telegraph Co.*, Dkt. 11972; 22 F.C.C. 1220 (1957); 23 F.C.C. 689 (1957). The United States Department of Justice advised the FCC on March 27, 1957, September 6, 1957, October 4, 1957, and October 14, 1958 that the Telephone Company tariff proposal was barred by the provisions of the antitrust decree; was beyond the Commission's regulatory jurisdiction; provided for "tying arrangements" in violation of Section 3 of the Clayton Act; and raised serious questions under the Sherman Act. Dkt. 11972. On February 10, 1959, AT&T withdrew that tariff in view of the "controversy" under the antitrust decree raised before the FCC, but announced its intention to engage in the same business under slightly different arrangements.

[6] Insofar as the Federal Communications Commission may have disputed the Department of Justice, this appears no longer so today. In *Connecticut Water Co.*, 25 F.C.C. 1367, 1377-79 (1958), the Commission held that another AT&T subsidiary had violated the pertinent provisions of the antitrust decree by unlawful lease-maintenance arrangements for private mobile radio equipment. The Commission thereafter instituted a rule-making proceeding to implement the decree pursuant to the Commission's "obligation to consider relevant anti-trust matters in its general public interest determinations in its licensing functions." Federal Register, January 8, 1959, p. 219. The public notice advised that "The Commission has assumed no position at this time concerning the effects, if any, on the Consent Decree restrictions if such equipment lease-maintenance activity has been found or may be found, by any jurisdiction, to be 'the furnishing of common carrier communications services' and/or if the charges therefor are or may become 'subject to public regulation.'

affirmed the order of the Public Utilities Commission and its opinion that "if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction." (P. A13, *infra*).

The dissent by three Justices of the California Supreme Court proposed to "annul" the Telephone Company's tariffs under state law, and thus had no occasion to resolve the federal questions. The dissenting Justices nevertheless scored the Commission's "official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field." (P. A14, *infra*). According to the minority Justices,

> "The result of the majority decision upholding the order of the commission will be a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise." (P. A19, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents issues of far-reaching import in the reconciliation of state action with the paramount authority of federal antitrust decrees as well as the radio policies of the Communications Act in favor of competition, and raises a novel and substantial question as to the limitations of the Federal Constitution on state regulation sought by a monopoly to take over a private competitive business.

Comments or arguments on these points are invited herein for the purpose of aiding the Commission in the development of a position thereon." *Ibid.*

1. ***By authorizing the Telephone Company to engage in the private radio business contrary to the prohibitions of the antitrust decree, the California decision creates a sanctuary from the antitrust laws of the United States.***[7]

The *Western Electric/AT&T* antitrust decree represents a historic application of the antitrust laws to the communications industry of the United States. While that decree preserved the Western Electric/AT&T nexus intact, it confined AT&T and its subsidiaries to "common carrier communications services," with several specified exceptions, including the leasing and maintaining of private radio equipment during a five-year grace period.[8]

The California Supreme Court's decision threatens to nullify the restrictions of the federal decree. If the decree's ouster of the Telephone Company from non-

[7] The effectuation of federal decrees enforcing the United States Constitution in another context may create similar problems. Compare *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *James* v. *Almond*, 27 U. S. L. Week 2361 (E.D. Va. Jan. 19, 1959).

[8] Section V of the antitrust decree provides as follows: "The defendant AT&T is enjoined and restrained from engaging, either directly or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply to (a) furnishing services or facilities for the plaintiff or any agency thereof, (b) experiments for the purpose of testing or developing new common carrier communications services, (c) furnishing circuits to other communications common carriers, (d) for a period of five (5) years from the date of this Final Judgment, *leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation*, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment, (e) directory advertising, (f) advice or assistance to other communications common carriers, or (g) businesses or services incidental to the furnishing by AT&T or such subsidiaries of common carrier communications services." *United States* v. *Western Electric Co., Inc. and American Telephone & Telegraph Company*, Civ. No. 17-49, 1956 CCH Trade Cases, par. 68, 246 (D. N. J. 1956) (emphasis added).

common carrier private businesses (other than the exempted directory advertising, government contracting, etc.) is avoided by the Telephone Company's voluntary submission to state regulatory commissions through the device of "tariff" filings, the decree becomes a porous paper fostering rather than restricting monopoly. For then AT&T and its subsidiaries could usurp and monopolize *any* private communications business in the future, so long as a "tariff" was approved by a regulatory Commission.

Such a holding is in direct conflict with paramount federal law. Federal supremacy in the field of antitrust requires that state authorization of arrangements contrary to a Sherman Act decree "must yield to the Act's declaration that such agreements are unlawful." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 177 (1942). Above all, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332, 344-347." *Parker* v. *Brown*, 317 U. S. 341, 351 (1943).[3]

The authorization granted by the Supreme Court of California to the Telephone Company, contrary to the federal antitrust decree, presents a vital issue warranting plenary review. Civil antitrust proceedings often culminate in remedial decrees which seek to restore and preserve competitive conditions in an industry. If State tribunals may interpose their authority so as to thwart the federal plan of the decree, a new avenue to circumvent the antitrust laws is opened. Compare

[3] See also *Local 24 of I.B.T.* v. *Oliver*, 358 U. S. 283 (1959); *Asheville Tobacco Board of Trade* v. *Federal Trade Commission*, 27 U. S. L. Week 2390 (4th Cir. Jan. 20, 1959); *Royal Oil Corp.* v. *Federal Trade Commission*, 27 U. S. L. Week 2351 (4th Cir. Jan. 5, 1959).

Northern Securities Co. v. *United States,* 193 U. S. 197, 345-47 (1904); *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176 (1942); *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384, 389, 395 (1951).[10]

2. *The state public utilities regulation of the private radio business conflicts with the paramount federal policy of the Communications Act for the competitive development of radio.*

The federal Communications Act of 1934 establishes a pervasive and plenary policy for the development of the radio art on a competitive basis in order to promote the maximum benefits for the American people from the public radio spectrum. Title III of the Act maintains the "control of the United States over all the channels of interstate and foreign radio transmission," and vests the Federal Communications Commission with authority to assign temporary licenses for radio frequencies utilized in conformity with the statute and regulations.[11] In the furtherance of this objective, the Act provides for detailed controls by the Commission over the operations and apparatus of radio licensees. Sections 303, 308, 310; 47 U. S. C. §§ 303, 308, 310. Also, coupled with a mandate that the Com-

[10] The precise powers of state courts with respect to a federal antitrust decree are not settled. Compare *Straus* v. *American Publishers' Ass'n,* 231 U. S. 222, 237 (1913); *Lyons* v. *Westinghouse Electric Corp.,* 222 F. 2d 184, 189-190 (2d Cir. 1955), *cert. denied,* 350 U. S. 825 (1955); *United States* v. *Bayer Co.,* 135 F. Supp. 65 (S.D. N.Y. 1955). Significantly, the Expediting Act confers exclusive appellate jurisdiction on this Court to review antitrust decrees. *Swift & Co.* v. *United States,* 276 U. S. 311 (1928); *United States* v. *California Co-operative Canneries,* 279 U. S. 553 (1929).

[11] Compare *Allen B. Dumont Laboratories* v. *Carroll,* 184 F. 2d 153, 155 (3d Cir. 1950), *cert. denied,* 340 U. S. 929 (1951); *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 214 (1943); *Federal Communications Commission* v. *Sanders Bros.,* 309 U. S. 470, 474 (1940).

mission "generally encourage the larger and more effective use of radio in the public interest," the Act incorporates and applies to radio communications as well as "apparatus and devices" the antitrust laws' prohibitions on trade restraints and monopolization, and expressly directs the Federal Communications Commission to enforce against common carriers the Clayton Act's ban on exclusive and tying arrangements. Sections 303(g), 313, 602(d); 47 U. S. C. §§ 303(g), 313; cf. 15 U. S. C. §§ 14, 21.

A direct conflict with the Communications Act results from the Supreme Court of California's approval of the Telephone Company tariff. The court misconceived the scope and significance of the limited exemptions in that statute which permit some intrastate regulation by State commissions, *subject to* the paramount policies of the radio provisions of the Act.[12] The court not only ratified state utility controls over radio equipment in disregard of the express powers entrusted in the Federal Communications Commission by Congress. It also sanctioned a voluntary tariff covering a Telephone Company "package" rate for the leasing and maintenance of radio equipment (including replacement and spare parts) despite the prohibitions of the antitrust laws on monopolistic tying arrangements.[13] In net effect, the state obligated the Telephone Com-

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[12] See, *e.g.*, 47 U. S. C. §§ 152(b), 153(e), excerpted at pp. A23-24, *infra*; and compare *Benanti* v. *United States*, 355 U. S. 96, 105 (1957), 67 Yale L. J. 932 (1958), where the Court deemed these exceptions of a "limited" and "technical nature" by contrast with the broader policy considerations underlying the Act.

[13] Cf. *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1, 4 (1958). The virtually identical AT&T Tariff No. 235 was viewed by the Department of Justice as illegal *per se* under the Clayton Act on its face, in probable violation of the Sherman Act, and contrary to the public interest in a competitive communications industry. See note 5, *supra*.

pany as a public utility to perform business arrangements with licensees of the Federal Communications Commission—whose licenses would then have to be set aside for being based on equipment contracts that violate the federal antitrust laws as well as the federal antitrust decree. Cf. *Connecticut Water Co.*, 25 F. C. C. 1367, 1379 (1958).

This collision of California law with the federal Communications Act raises issues of prime national concern. Because of the potential of the electronics art for providing an economical means of private radio communication over the public airwaves on a competitive basis, the legal framework for this development is of critical importance. If private radio communications may be taken over by telephone monopolies under the sponsorship of state utility commissions, as held below, the Congressional design becomes a blueprint for the monopolistic exploitation of the radio spectrum contrary to Title III of the Communications Act.

Only this Court can draw the line between permissible State jurisdiction over local communications and unlawful encroachments on the domain of competitive enterprise in radio sponsored by state regulatory bodies. The accommodation between state action and the paramount policy of the Communications Act in other areas has not only evoked this Court's review in the recent past,[14] but becomes of mounting public concern as the uses of the radio spectrum are advanced by a dynamic technology.

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[14] Cf. *Benanti* v. *United States*, 355 U. S. 96 (1957); *Farmers Educational and Cooperative Union* v. *WDAY*, No. 248, O. T. 1958.

3. *State utility control sought by a monopoly to take over a competitive business raises substantial questions under the Fourteenth Amendment.*

Voluntary or procured "regulation" by a corporation is the antithesis of recognized Constitutional processes for protecting the public. As summarized by the dissenting opinion of Justice Stone, joined by Justices Holmes and Brandeis, in *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 447 (1927):

> "Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community." *Id.* at 451-452.

In short, the Constitutional premise for utility controls lies in the absence (or suspension) of the "regulative force of competition," so that the protection of the public from monopolistic exactions must be reposed in their government.

But without these necessities which *require* regulation, utility controls may stifle competition and promote monopoly, in conflict with the creed of a competitive enterprise system.[15] As traced by Judge Learned

[15] Cf. Adams & Gray, *Monopoly in America, The Government As Promoter* c. III (1955); Hamilton, *The Politics of Industry* cc. III, V (1957); Book Review, 68 Yale L. J. 614 (1959).

Hand, the American antitrust philosophy assumes that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 427 (2d Cir. 1945). In the words of this Court, "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take." *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 605 (1953).

Every premise supporting public utility controls is warped in the case at bar. While the state court's interpretation of California statutes is binding here, neither the pertinent provisions nor the opinions below reflect a rational reason why the private radio business in California should be deemed a "public utility," or how free competition in the radio industry has failed to serve the needs of the people of that State.

Indeed, no rational explanation *can* exist. Unlike the public telephone network, a "natural monopoly" where duplication of facilities to provide competition would be exorbitant and wasteful, there is no rationalization for monopoly in the private radio communications business. The evidence reported by the State Commission discloses that this "is in fact a highly competitive industry in which over 100 persons are

directly engaged in California alone." 55 Cal. P. U. C. at 393.[16]

The three minority judges below perceived the "realities of the situation": "Pacific, by its purported dedication of its private mobile radiotelephone equipment and maintenance service and its filing of a tariff schedule, cannot impart the character of a true public utility into that which is essentially a highly competitive private enterprise. The action of the commission, in the premises, gives official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field." (P. A14, *infra*). Furthermore,

> "Surely the commission is not presuming that Pacific is altruistic in filing schedules for its activities in this field. And certainly Pacific has the right to seek expansion, diversification, and increased profits—but not by the process of bringing disparate segments of private enterprise into its monopolistic domain. * * * The decision of the majority places the stamp of approval upon bureaucratic recognition, as well as control, of Pacific in a type of business which has not been shown to require regulation as a monopoly. The private mobile communication business has heretofore operated satisfactorily under the freely competitive conditions which have characterized it." (P. A19, *infra*).[17]

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[16] The Commission agreed that no "certificate of convenience and necessity" was needed by the Telephone Company for the leasing and maintaining of private mobile radio systems. 55 Cal. P. U. C. at 394-396.

[17] The minority opinion quoted from *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246-247 (1902), where this Court said that "an

The odd nature of the regulation bestowed on the Telephone Company is shown by its discriminatory dimension. The public utility status declared by the California Commission was confined *solely* to the Pacific Telephone and Telegraph Company. It did *not* extend to the numerous other enterprises, such as appellants, which carry on the identical business and compete for the same customers, often with the identical equipment that is leased by the Telephone Company to private users.[18]

While this Court ordinarily is loath to interfere with a state's regulatory experimentation, the Fourteenth Amendment sets *some* limit beyond which State action cannot go.[19] In the ascertainment of the "invidious discrimination" prohibited by the Equal Protection Clause, this Court recently advised that "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). Here the Public Utilities Commission conferred its regulation on a single corporation at its own behest, without semblance of genuine public justification, enabling a telephone monopoly to

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arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange • • • is no more public in its nature than speaking tubes or call bells in a building."

[18] As per the opinion below, "[n]o jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the Commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public." (P. A9, *infra*).

[19] Compare *Morey* v. *Doud*, 354 U. S. 457 (1957); *Day-Brite Lighting* v. *Missouri*, 342 U. S. 421, 423 (1952); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n*, No. 252, O. T. 1958.

take over an industry where vigorously competing enterprises have long served the consumer.[20]

Whatever the residual force of the Due Process Clause to bar arbitrary action by States jeopardizing a person's economic survival,[21] it surely proscribes letters of marque, in the guise of public utility status, permitting a monopoly to prey on its independent competitors.

The decision below was thus appraised by a California observer:

> "What, then, is the net effect of this decision? Pacific, protected by the state against destructive competition, has become a giant in the field of telephone communication. Because of its size and the wide scope of its facilities, it is now in a position to preempt the field of lease-maintenance of radio equipment to individual users for private purposes. * * * It may well be that the *Commercial Communications* case has created conditions conducive to the growth of an undesirable monopoly in this field. If this is the practical result, the state is in the anomalous position of creating the very thing which public utility regulation was originally established to control." Comment, *Utilities, The State, and the Public Interest*, 10 Hastings L. J. 176, 187 (1958).

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[20] Though its rationale is obscure, the Commission placed great store in the Telephone Company's purported "dedication to the public" of its property and service. 55 Cal. P. U. C. at 393-5. Inasmuch as private competitors in this field bid for the same customers on the same basis as the Telephone Company, a firm's "dedication" is here but a legal truism devoid of factual significance other than a yen for the cloak of regulation. The Commission also cited a previous administrative ruling, not contested by the Telephone Company, which held that a sale and lease-back deal whereby the Telephone Company took over another company's private radio system was subject to PUC jurisdiction. 54 Cal. P. U. C. 71 (1955).

[21] Cf. *Schware* v. *Board of Examiners*, 353 U. S. 232, 238 *et seq.* (1957).

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment tolerate discriminatory business regulation imposed for the sake of private monopoly rather than the protection of the public is a substantial issue deserving review by this Court. The numerous precedents which sustain State regulatory action do not consider, let alone approve, such self-serving regulation sought by a monopoly.

CONCLUSION

For the above reasons, appellants submit that the divided decision of the Supreme Court of the State of California poses federal questions of national importance which warrant plenary resolution by this Court.

Respectfully submitted,

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February 21, 1959.

APPENDIX A

The majority and dissenting opinions of the Supreme Court of California, reported at 50 Cal. 2d 512; 327 P. 2d 513, and the order denying rehearing are as follows:

IN THE SUPREME COURT OF THE STATE OF CALIFORIA

Copy filed June 27, 1958. WILLIAM I. SULLIVAN, Clerk. By ——, ——, S. F. Deputy.

IN BANK

S. F. 19722

COMMERCIAL COMMUNICATIONS, INC. (a corporation), ET AL., PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

S. F. 19723

WATSON COMMUNICATIONS SYSTEMS, INC. (a corporation), ET AL., PETITIONERS,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

S. F. 19725

THE CITY OF LOS ANGELES, A Municipal Corporation, PETITIONER,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENT.

1

SEE DISSENTING OPINION

This is a consolidated proceeding to review an order of the Public Utilities Commission accepting, with modifications and directions, tariff schedule No. 108-T filed by Pacific Telephone and Telegraph Company, hereinafter called Pacific. The schedule was voluntarily filed and covered the installing, leasing and maintaining of private mobile communications systems. The tariff was originally

accepted to become effective April 30, 1956, but at the request of petitioners a rehearing was granted and the commission conducted an investigation into the proposed rates and conditions and an inquiry as to the scope of its own jurisdiction. The petitioners, with the exception of the City of Los Angeles, are private persons or firms engaged in furnishing similar service on a private contract basis, in competition with Pacific, which heretofore has offered this service only on a contract basis. The City of Los Angeles has appeared on behalf of customer interests of its own and its inhabitants, and pursuant to its public-spirited interest in utility regulation and growth. The petitioners [1] urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree [2] to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party.

As a basis for its order the commission found and concluded: 1. That Pacific is a telephone corporation and public utility in the performance of this service; 2. That the private mobile communication systems and service heretofore furnished under contract by Pacific and proposed in this tariff schedule constitute a telephone line and public utility telephone service, under the provisions of the Constitution and the Public Utilities Code, and that Pacific has dedicated the same to the public; 3. That the equipment so used is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to commission jurisdiction as provided in section 851 of the

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[1] Petitioner Thomas Poor, an individual doing business as Bakersfield Electronics, appears as one of the petitioners on the Watson Communication Systems, Inc. brief. He did not petition for a rehearing before the commission, and therefore has no standing before this court as a petitioner for review. (Pub. Util. Code, § 1731.)

Petitioner Gamewell Company did not petition for rehearing and likewise has no standing to petition for review. This court gave it permission to file a brief, without opposition from the commission until after the brief was filed. It is not necessary to rule on the commission's motion to strike this brief as it may be treated as an amicus curiae brief.

Amici curiae briefs have also been filed by several interested parties.

[2] *United States of America* v. *Western Elec. Co., Inc.* and *American T. & T. Co. et al.*, Civil Action No. 17-49, U.S.D.C.

Public Utilities Code[3]; 4. That the commission under sections 455, 728 and 729 has the power to establish rates for these systems in lieu of contracts; 5. That the commission under section 455 has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable; 6. That the proposed rates, with the revisions and supplementations ordered are just and reasonable.

Pacific is a private corporation engaged in the public utility telephone business within this state. As such its services, property and charges are subject to the recognized supervision of the commission. However, under its charter Pacific may also engage in activities of a nonutility nature. Whether these activities unduly interfere with or hamper it in the performance of its public utility obligations or affect property owned by it which is necessary or useful in the performance of its obligations to the public, are of course, generally, questions within the cognizance of the commission (§§ 701, 702, 851). It is sometimes a question of mixed law and fact as to whether a particular activity is within the regulatory scope of the commission. Here we must look to the nature of the activity furnished under this tariff schedule as well as the question of dedication, to determine the jurisdictional issues presented.

Private mobile communication systems, as the name implies, afford direct oral communication with persons in moving vehicles. Tariff 108-T defines "private mobile communication systems" as "one or more land stations, and one or more mobile stations, or two or more mobile stations, together with associated equipment, for radiotelephone communication between land and mobile stations or between mobile stations." It defines a land station as an "operational fixed radiotelephone station used with a private mobile communication system as a base station" or as a repeater, control or relay station. A mobile station is comprised of "a transmitter, a receiver (with loudspeaker), a push-to-talk handset or microphone, and an antenna." Because it involves the use of radio, there must be compliance with the requirements of the Federal Communications Commission and the provisions of the Federal Communications Act (Comm. Act of 1934, 48 Stat. 1064, 47 U.S.C.,

[3] Unless otherwise indicated all references hereafter are to the Public Utilities Code.

§ 151 *et seq.*, as amended). The person, firm or corporation desiring to have a private mobile communication system must apply to the federal commission for allocation of a radio wave length and for permission to operate the required equipment. The conditions for a license vary with the purpose for which the use is desired, and the system is licensed to be operated for that specific use only. The equipment may be manufactured, purchased or leased by the licensee but he must satisfy the commission that it meets its operating requirements. He may install, maintain and repair the equipment himself or he may delegate these duties but he must remain in control of the equipment. He is subject to punishment by the federal commission for violation of its regulations. The tariff of Pacific complies with the regulations of the federal commission.

Private mobile communication systems differ in some respects from public mobile communication systems. Pacific, as a common carrier telephone company, is licensed by the federal commission to operate public systems over the radio frequencies allocated for this public use. It may install radiotelephone equipment in the vehicle of a subscriber for this use, but all calls must be completed through the company's central office, with the intervention of a company operator to ask for the number and to make the connection. Calls in any number may be made on the company's exchange system throughout the world. This service obviously can only be furnished by a public utility telephone company. It is appropriate and effective for persons needing only occasional communication to or from their vehicles with their offices. It has been furnished by Pacific under tariffs filed with the state commission for the past decade.

Private mobile communication service fulfills a more specialized need. Where a continuously free channel is required, it is more efficacious. After the close of World War II and the Korean conflict government, industry and many organizations began to make extensive use of this type of service for quick, private communication with employees or agents in trucks and automobiles, and there is an ever increasing demand for the service. It is probably most widely known in connection with its use by law enforcement officers and taxicab companies. Pacific entered the field of furnishing private mobile systems in 1948 with two contract customers. In 1954 it was required by the state commission to file copies of its contracts. Subsequently (Order 51446,

Re Southern Counties Gas Co., 54 Cal. P.U.C. 75) the commission held that this service would become a public utility service but that there was not then sufficient experience to warrant the filing of tariffs, that this was still an experimental venture and that it might be a disservice to Pacific's telephone rate-payers to require it at that time to file tariffs and to offer this service to all comers. This decision was not challenged. When Pacific filed tariff schedule 108-T in 1956 it had 214 contract customers, covering 1702 private mobile units, and had 225 inquiries on hand for private systems. The 214 contracts represented only 4.5% of the total private mobile base stations then licensed in this state.

The petitioners urge that in furnishing these private systems on a lease-maintenance basis Pacific is merely engaging in an equipment service, not a "telephone service" and they stress the importance of the following differences between public and private systems: that the private systems have no tie-in or interconnection with the general toll and switching facilities of Pacific; that Pacific cannot furnish the radio channel or the license to operate the equipment but these must be secured by the user; that the user must remain in control of the equipment; that he remains responsible to the federal commission; that the equipment and maintenance may be obtained from many private sources, whereas public mobile communications may be obtained only from a public utility telephone company; that the power for energizing the sending apparatus may be obtained from other sources than a telephone company; that for the operation of the private systems there is no dependence upon rights or monopoly, eminent domain or franchise; that Pacific is merely leasing inert radio equipment; that this service is not available to all of the public, and does not come within the common understanding of a telephone system offering.

Article XII, section 23, of our Constitution provides: "Every private corporation . . . *owning*, managing, *or* controlling any . . . plant, or equipment, *or any part of such . . . plant or equipment within this State . . . for the transmission of telephone . . . messages . . . either directly or indirectly, to or for the public . . . is hereby declared to be a public utility* . . . and every class of private corporations . . . hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation.

The . . . Commission shall have . . . such power and jurisdiction to supervise and regulate public utilities . . . and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature. . . ." (Emphasis added.) In the Public Utilities Code the Legislature has further defined "public utility" as including "every . . . telephone corporation . . . where the service is performed for or the commodity delivered to the public or any portion thereof" (§ 216, subd. (a)) and has provided that "Whenever any . . . telephone corporation . . . performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this part." (§ 216, subd. (b)) "Telephone corporation" is defined as including "every corporation or person owning, controlling, operating, *or managing any telephone line for compensation* within this State" (§ 234); and "telephone line" is defined as including "all . . . property *owned*, controlled, operated, *or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.*" (§ 233.) (Emphasis added.)

It is readily apparent that by the use of the disjunctive it was intended that *ownership* of any plant or equipment would be sufficient and that operation and control were not made prerequisites to commission jurisdiction; furthermore that such ownership may be of "any part" of such plant or equipment. It is therefore immaterial that Pacific does not remain in control of the equipment or that it does not furnish the radio channel over which the equipment is operated. These are matters of limitation imposed by the federal commission. The requirement that there be no interconnection with the general toll and switching facilities of Pacific is also imposed by the federal commission and acquiesced in by Pacific, although such connection is physically possible and, in stated cases of public emergency, is permissible.

The fact that private mobile communication systems may be obtained from sources other than a public utility, does not detract from the utility nature of this service which is offered to the public under a voluntarily filed tariff. Regu-

lated and nonregulated services compete in many fields[4] and there is no requirement in our Constitution or laws that telephone service may be offered only by a monopoly. In some of its phases a telephone company, dedicated to the public service, does tend to become a monopoly (*Cal. Fire Proof Storage Co.* v. *Brundage*, 199 Cal. 185, 189). Were this not so, severe annoyance and economic waste might be caused if telephone users were obliged to subscribe to many competing companies, with duplicate instruments on their desks, and with transmission wires invading the skies or radio telephony cluttering the frequency channels, in order to obtain complete telephone service.

The real issue presented is whether the service offered by the proposed tariff is "for the transmission of telephone messages" or "in connection with and to facilitate communication by telephone."

The word "telephone" is not defined in the code. In its narrow sense "telephone" refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as "An instrument for reproducing sounds, especially articulate speech, at a distance." In defining "telephony" the Encyclopaedia Britannica (1954 ed.) states "In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means." As this court pointed out in *Television Transmission* v. *Public Utilities Commission*, 47 Cal. 2d 82, 88, in telephony "one may carry on a two-way communication by speaking as well as by listening" and it is distinguishable from radio broadcasting in that the latter "is usually associated with music halls, theaters and newspapers." While mobile communication involves an application of the art of radio to telephone communication, it is more akin to telephony than to radio broadcasting.

In determining whether Pacific is here offering a telephone service, it appears to be basic that what a telephone

[4] *Story* v. *Richardson*, 186 Cal. 162 (sale of excess electrical energy by a private person); *Sou. Calif. Edison Co.* v. *R. Com.*, 194 Cal. 757 (sale of surplus water by a private person); *Market St. Ry. Co.* v. *R. Com.*, 24 Cal. 2d 378, aff'd 324 U.S. 548 (competing transit service by a municipal utility and a commission-regulated utility); *Samuelson* v. *Pub. Util. Com.*, 36 Cal. 2d 722 (competing highway contract carriers and highway common carriers).

company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone. In its earliest beginnings this transmission was over a single iron wire connecting two telephone instruments with ground return circuits. It was over such a wire that Alexander Graham Bell called to his startled assistant, "Mr. Watson, come here, I want you." That was in March 1876. Many technological improvements in the art of telephony have since been made, including radiotelephony and the instruments used for carrying on conversations at distances greater than the human voice naturally carries. The exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law. In common understanding the communication effected by private mobile systems would appear to be a telephone communication. Section 233 above quoted expressly recognizes that communication may be made without the use of transmission wires. Among the other uses of radio is the transmission of telephone messages without the use of wires. We are informed that today ordinary toll telephone service is furnished as much by radio as by land lines and that Pacific now operates about 350,000 toll circuit miles of microwave radio relay in California. It also uses radio for such diverse services as rural subscriber lines, coastal harbor service and highway service. All of these are treated as public telephone service under filed tariffs. Because of the physical nature of the medium here used (radio), the private nature of the communication contemplated and the restrictions established by the federal commission, private radio-telephone differs in some respects from public radiotelephone service and also from land line telephone service. Nevertheless it is a telephone service and if dedicated to public use it is subject to the jurisdiction of the respondent commission.

The commission found that Pacific has dedicated this service to the public. The fact that only a restricted portion thereof is eligible to apply for it is not determinative. It is offered to all of the public who may be eligible to apply for it. Dedication to a portion of the public will suffice. (§§ 216, 207[5]; *Camp Rincon Resort Co.* v. *Eshle-*

[5] Section 207: "'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation . . . for which the service is performed or to which the commodity is delivered."

man, 172 Cal. 561). This service is within a class recognized by the Constitution and the Legislature as a public utility. The cases cited by petitioners in which dedication constituted the main problem do not present any difficulty.

No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners, they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (*Stephenson* v. *Binford*, 287 U.S. 251, 277; *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, 367-369; *Hicklin* v. *Coney*, 290 U.S. 169, 172-173.)

Nor are the petitioners denied equal protection of the law by the fact that a regulated company competes with them in this service. The commission found as a fact that there was no unfair competition by Pacific in this field, and ruled that it would not allow Pacific to give its private mobile customers service which it would not make available to the customers of its competitors and that it would require Pacific to maintain charges which would be fully compensatory. The rates prescribed by the tariff were found, with the modifications ordered, to be fair and reasonable, and as to this the conclusion of the commission on the record presented is binding upon this court.

There is no sound basis for the contention that the regulation of this service is outside the permissible sphere of government regulation and that it contravenes the 14th Amendment. There are several respects in which the private mobile communication systems are of public concern. The evidence shows that these systems are for a considerable part used by public transportation companies, trucking companies, law enforcement agencies, fire departments, and utility companies such as irrigation and water companies. Their purpose is the maintaining of communication with vehicles moving on the public streets and highways. The medium used is radio and is generally of public concern. ". . . (W)here the control is for the public good any industry may be regulated, provided there is 'adequate reason' for it. That 'adequate reason' can only be to achieve a purpose within the police power of

the state." (*State Board* v. *Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 443). The jurisdiction exerted by the commission over this tariff offering goes merely to the regulation of the telephone service offered by a public utility, a matter concededly within the police power of the state and the powers given to the commission by the Constitution and the Legislature.

Also in support of its jurisdiction the commission found that the private mobile communication equipment is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to its jurisdiction, as provided in section 851;[6] that under sections 455, 728 and 729[7] it has the power to establish rates for these systems in lieu of contracts; and that under section 455 it has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable. These findings may not be disregarded.

It is well established that the powers of regulation conferred upon the commission by the Legislature must be cognate and germane to the regulation of public utilities. (*Pac. Tel. & Tel. Co.* v. *Eshleman*, 166 Cal. 640; *Morel* v. *R. Com.*, 11 Cal. 2d 488, 492.) When these powers relate to telephone companies they must be cognate and germane to the regulation of public utility telephone companies. In this instance the exercise of jurisdiction over this service would seem to be reasonably within the powers so granted to the commission. Its authority to regulate the rates charged by Pacific for this lease-maintenance service sufficiently appears in section 210,[8] 489[9] and 701.[10]

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[6] Section 851. "No public utility shall sell, lease . . . any part of its . . . plant . . . or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. . . ."

[7] Sections 455, 728 and 729 set forth the procedure whereby the commission may investigate the propriety and reasonableness of rates contained in tariffs lawfully filed, and establish new rates.

[8] Section 210: " 'Rates' includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise."

[9] Section 489: "Under such rules as the commission prescribes, every public utility other than a common carrier shall file . . schedules showing all rates, tolls, rentals, charges . . . together with all . . . contracts . . . which in any manner affect or relate to rates, tolls, rentals, classifications or service. . . ."

[10] Section 701: "The commission may supervise and regulate every

This leaves for consideration the question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to.

The respondent commission held that the provisions of section 2, subdivision (b) [11] and section 3, subdivision (e) [12] of the Communications Act of 1934 as amended (47 U.S.C., §§ 152, 153) make it clear that the federal commission has no jurisdiction, except under the radio licensing provisions of the act, over intrastate communication service by radio, and that "intrastate communication by radio" does not include communication between points in the same state if such communication is regulated by a state commission. The proposed tariff applies only to service within this state. The commission's ruling would appear to be correct. It is noted that the Federal Communications Commission has not asserted jurisdiction over such tariffs or rates.

In January 1956 the Department of Justice brought a proceeding under the Sherman Act in the United States District Court in New Jersey against Western Electric Company, Inc. and American Telephone and Telegraph Company. By consent of the parties and without trial of the issues a consent decree was entered. Under the federal antitrust laws where no trial is had and no testimony taken, a consent decree is not evidence of or an admission of any of the charges contained in the complaint. (15 U.S.C. 16; *Barnsall Refining Corp.* v. *Birnamwood Oil Co.* (E.D. Wis. 1940) 32 F. Supp. 308, 310-311.)

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public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

[11] Section 2, subdivision (b) (47 U.S.C. 152, subdivision (b)) which provides in part as follows: "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."

[12] Section 3, subdivision (e) (47 U.S.C. 153, subdivision (e)), which provides: "'Interstate communication' . . . means communication . . . (1) from any State . . . to any other State . . . but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State . . . if such communication is regulated by a State commission."

(Note: Subchapter II is entitled "Common Carriers.")

The New Jersey court specifically retained continuing jurisdiction to issue orders and directions with reference to the construction or enforcement of this final judgment. From the briefs submitted in the proceeding before this court it appears that the original parties to the New Jersey proceeding take opposing views as to the meaning and effect of subdivision (d) of section V of that decree which provides as follows:

"The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment. . . ."

The Department of Justice takes the view that under subdivision (d) the defendants in that action were prohibited from engaging in the business of leasing and maintaining facilities for private mobile communications systems, but were allowed a cut-off period of five years for serving those who were lessees within 45 days after the date of the judgment. Its view is that the phrase in subdivision (d) reading "the charges for which are not subject to public regulation" is descriptive of the fact stated, namely, that such charges *are not subject to public regulation.* The other parties to the consent decree are of the view that this phrase merely provides that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from continuing to furnish equipment and facilities for private mobile communications systems. Pacific, as hereinabove stated, was a party to that decree and would be bound by its terms.

Insofar as we are advised no ruling has been obtained from the New Jersey federal court as to the meaning and effect of subdivision (d) of section V, and no adjudication of this issue has been made by the Federal Communications Commission. However, it has been brought to our attention that in a Memorandum Opinion and Order released November 21, 1957, in the proceedings entitled "In the Matter of American Telephone and Telegraph Company, *et al.*, Lease and maintenance of equipment and facilities

for private communication systems, Docket No. 11972," in which this issue was sought to be raised, the federal commission stated it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree to prohibit the service, regulated or unregulated. That commission made no actual determination on this question.

In the proceedings before the state commission some of the petitioners argued that Pacific's motive in filing the proposed tariff 108-T was to avoid the consent decree. The commission held that there was no proof to that effect; that it would not take judicial notice of good or bad intentions; that if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction. No good reason appears why the decision of the commission in this respect should be disturbed.

The order is affirmed.

SHENK, J.

We Concur:

GIBSON, C. J.
TRAYNOR, J.
SPENCE, J.

S. F. 19722

COMMERCIAL COMMUNICATIONS, INC.,

v.

P. U. C.

S. F. 19723

WATSON COMMUNICATIONS SYSTEMS, INC.,

v.

P. U. C.

S. F. 19725

THE CITY OF LOS ANGELES,

v.

P. U. C.

DISSENTING OPINION OF SCHAUER, J. TO OPINION BY SHENK, J.

If we follow established law, or even the fundamental principles of our governmental plan, we should hold that the Public Utilities Commission is without jurisdiction in this matter because it clearly appears that the private mobile radiotelephone operations of the Pacific Telephone Company are not public utility operations. Pacific, by its purported dedication of its private mobile radiotelephone equipment and maintenance service and its filing of a tariff schedule, cannot impart the character of a true public utility into that which is essentially a highly competitive private enterprise. The action of the commission, in the premises, gives official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field. This public utility company should not be allowed to convert the furnishing of equipment and maintenance service for private communications into an operation under control of the Public Utilities Commission.

The conditions of the furnishing of equipment and facilities by Pacific are described as follows in Schedule 108-T, filed by Pacific with the Public Utilities Commission. The

lessee-licensee is "responsible for securing from the Federal Communications Commission the necessary authorizations for the communications system and the operating personnel as may be required in accordance with the Rules and Regulations of the Federal Communications Commission."

"The station licensee shall have exclusive control of the communication facilities furnished to such licensee and full responsibility for their use and operation in accordance with the station authorization and the Rules and Regulations of the Federal Communications Commission.

"The station licensee shall have unlimited right of ingress to and egress from any premises of the Telephone Company on which is located land radio station equipment furnished to each licensee under this schedule, and the licensee shall have unrestricted access to such equipment."

The lessee must provide and maintain an adequate power supply for each mobile station and, unless the land station is located on premises of Pacific, must provide and maintain an adequate power supply for the land station.

Pacific undertakes only to furnish, install, and maintain the facilities for communication.

The foregoing description by Pacific of the private mobile communication operation shows that the operation is essentially a private business, not a public utility service. The lessee, not Pacific, must secure the requisite authorization for radio operation from the Federal Communications Commission. The lessee has full responsibility for the operation and exclusive control over the communication facilities. The lessee provides the power for operation of the station (except in the few and entirely distinct situations of land stations on telephone company property). Thus it is the lessee who operates and controls the communication service; Pacific merely invades the field of private enterprise to furnish and maintain equipment necessary or convenient to the carrying on of the private communications.

There is nothing in the nature of the private mobile communications business which contemplates that the supplier of the communications equipment retain an interest in it, as Pacific does; most private manufacturers of such equipment sell the equipment to those who operate it. The many thousand of such privately owned items of equipment

installed and maintained in aircraft are subject to regulations of both the Federal Communications Commission and the Civil Aeronautics Administration. To what extent the Public Utilities Commission of California expects to overlap the jurisdiction of the federal regulatory bodies is not precisely defined.

According to the majority's construction of the applicable provisions of the state Constitution [1] and the Public Utilities Code,[2] the Constitution has authorized the Legislature to provide, and the Legislature has provided, that any service in connection with any telephonic communication, public or private, is a public utility service subject to the jurisdiction of the Public Utilities Commission if it

[1] Cal. Const., art. XII, Sec. 23: "Every corporation . . . owning . . . equipment . . . for the transmission of telephone . . . messages . . ., either directly or indirectly, to or for the public . . . is hereby declared to be a public utility subject to such control and regulation by the . . . Commission as may be provided by the Legislature. . . . The . . . Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. . . ."

[2] Pub. Util. Code, Sec. 216: "(a) 'Public utility' includes every . . . telephone corporation . . . where the service is performed for or the commodity delivered to the public or any portion thereof.

"(b) Whenever any . . . telephone corporation . . . performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such . . . telephone corporation . . . is a public utility subject to the jurisdiction, control and regulation of the commission. . . ."

Pub. Util. Code, Sec. 207: " 'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, (or) private corporation . . . for which the service is performed or to which the commodity is delivered."

Pub. Util. Code, Sec. 233: " 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Pub. Util. Code, Sec. 234: " 'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

is offered to the public or any portion thereof. But the Constitution should not lightly be understood as authorizing the Legislature to convert private business into a public utility and the legislation enacted pursuant to the Constitution should not be understood as intended so to do.

Private mobile radiotelephone communication systems are analogous to private inter-office or intra-building communication systems. Concerning the latter type of communication system the following language and holding of *Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), 186 U.S. 238, 246-247, are pertinent: "it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government of the District (of Columbia), and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other: a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business." The described system, it is held, was not subject to rate regulation by Congress. (See also *City of St. Paul* v. *Tri-State Telephone & Telegraph Co.* (1935), 193 Minn. 484 (284 N.W. 822) (telephone systems, separate from the general public telephone system,

for city's fire and police departments are "a private use").)

Contrary to the majority opinion (p. 16 of ditto) it has been held that the fact that a private telephone system may be used by a governmental unit for governmental purposes does not make the system a public utility subject to regulation as such. (*Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), *supra*, 186 U.S. 238, 247; *City of St. Paul* v. *Tri-State Telephone & Telegraph Co.* (1935), *supra*, 193 Minn. 484, 486 (258 N.W. 822, 824).)

The fact that equipment for private mobile communications systems is furnished and maintained by a public utility corporation which also furnishes public utility facilities and service, does not mean that the corporation, as to the private service, can be compelled to file a tariff with the Public Utilities Commission or is entitled to have a tariff accepted by the commission. "The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation." (*Chesapeake & Potomac Tel. Co.* v. *Manning* (1902), *supra*, 186 U.S. 238, 247; see *Allen* v. *Railroad Commission* (1918), 179 Cal. 68, 82.)

The fact that Pacific has offered, by filing Schedule 108-T, to submit to the jurisdiction of the commission and to furnish communication equipment on a lease and maintenance basis without discrimination to persons authorized by the Federal Communications Commission to operate private mobile communications systems, cannot convert an essentially private business operation into a public utility offering. (See *Allen* v. *Railroad Commission* (1918), *supra*, 179 Cal. 68, 82.)

The opinion of the commission states, "We are not convinced that Pacific's presence in the field will constitute any threat to the continued vigor of its competitors. It should not, does not propose to, and will not be allowed to favor

its own private mobile customers by way of connections with its 'land lines' not allowed to the customers of its competitors. It will be required to maintain charges which are fully compensatory. It will be under the disadvantage of being unable to enter into price competition with its competitors to secure the business of particularly desirable customers; and it will be required to serve customers its competitors may not elect to serve. . . .

"The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors. . . . (I)n the Commission's opinion, the public has less to fear from the activities of a 'monopoly' when such 'monopoly' is fully regulated by public authorities and we fail to find that Pacific will be in a position to compete unfairly with its smaller rivals."

These determinations of the commission ignore the realities of the situation. Pacific, a public utility corporation, obviously is looking toward expanding the area of its operations into a field now serviced by private enterprise. Surely the commission is not presuming that Pacific is altruistic in filing schedules for its activities in this field. And certainly Pacific has the right to seek expansion, diversification, and increased profits—but not by the process of bringing disparate segments of private enterprise into its monopolistic domain. Of course it is true that Pacific currently, under free enterprise conditions, is far from having a monopoly in this field. But manifestly it is working toward elimination of the competition of private persons and firms in the newly invaded field of private mobile communication service. The result of the majority decision upholding the order of the commission will be a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise. The decision of the majority places the stamp of approval upon bureaucratic recognition, as well as control, of Pacific in a type of business which has not been shown to require regulation as a monopoly. The private mobile communication business has heretofore operated satisfactorily under the freely competitive conditions which have characterized it. Understandably the petitioners engaged in this business in the open market of free enterprise object to commission action which amounts to bureaucratic sponsorship of a

public utility corporation operating as a public utility in this field.

The following discussion in *General Alarm* v. *Underdown* (1953), 76 Ariz. 235 (262 P. 2d 671, 672-673 (1-3)), concerning a telephonic and telegraphic burglary, fire, and emergency alarm system is apropos: "To be a public service corporation, its business and activities must be such as to make its rates, charges, and methods of operation a matter of public concern. It must be, as the courts express it, clothed with a public interest to the extent clearly contemplated by the law which subject it to governmental control. Free enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception and are authorized under our constitution only for that class of business that might be characterized as a public service enterprise. The theory is that the right to public regulation and protection outweighs the customary right of competition. If the public contact with a business is such that its necessities and convenience can be better served through govermental supervision and controlled monopoly, thereby eliminating customary competition, the state may exercise its police power to that end. Such invasion of private right cannot be allowed by implication or strained construction. It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested or businesses that might incidentally transmit messages in furtherance of the main object of the enterprise that otherwise could not be so characterized. The public has some interest in all business establishments but that interest must be of such a nature that competition might lead to abuses detrimental to the public interest. The public interest contemplated depends on the nature of the business, the means by which it touches the public, and the abuses which may reasonably be anticipated if not controlled. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. Our constitution must and easily can be interpreted in harmony with these principles. So construed, it is only in the interest of the convenience and necessity of the public, of the nature and to the degree herein stated, that a business may be supervised and controlled, rates fixed or monopolies granted."

With reference to the provision of the 1956 consent decree

of the United States District Court for the District of New Jersey in *United States* v. *Western Electric Co.*, quoted in the majority opinion, pp. 20-21,[3] I would comment as follows: This provision is not a clear declaration that the charges for leasing and maintaining private communications systems are not subject to public regulation; neither is it a clear declaration that American Telephone and Telegraph Company and its subsidiaries are not enjoined from engaging in the business of leasing and maintaining facilities for private communications systems where the charges for those private communications services are subject to public regulation. In the circumstances it does not appear that the provision of the consent decree should influence the decision herein.

For the reasons above stated I would annul the order of the Public Utilities Commission.

We concur:

CARTER, J.
McCOMB, J.

SCHAUER, J.

[3] "The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment . . . "

Filed July 23, 1958. William Sullivan, Clerk. By R. J. Bell, S. F. Deputy.

ORDER DENYING REHEARING

S. F. No. 19722

S. F. No. 19723

S. F. No. 19725

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COMMERCIAL COMMUNICATIONS, INC., ET AL.,

v.

PUBLIC UTILITIES COMMISSION

WATSON COMMUNICATION SYSTEMS, INC., ET AL.,

v.

PUBLIC UTILITIES COMMISSION

THE CITY OF LOS ANGELES

v.

PUBLIC UTILITIES COMMISSION

Petitioners' application for rehearing Denied.

Carter, J.—Schauer, J. & McComb, J. are of the opinion that the application should be granted.

[Certification]

GIBSON,
Chief Justice.

APPENDIX B

PERTINENT STATUTORY PROVISIONS

COMMUNICATIONS ACT OF 1934

Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended

SECTION 2(b)

47 U.S.C. § 152(b)

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico * * * *

SECTION 3(e)

47 U.S.C. § 153(e)

For the purposes of this chapter, unless the context otherwise requires—

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State * * * to any other State * * * but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between

points in the same State * * * through any place outside thereof, if such communication is regulated by a State commission.

SECTION 301

47 U.S.C. § 301

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

SECTION 313

47 U.S.C. § 313

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *